

- (1) Whether claimant met with an occupational disease in Cowley County, Kansas.
- (2) If claimant met with occupational disease, what is the date of disablement?

- (3) Whether claimant's condition arose out of and in the course of his employment or whether multiple chemical sensitivity disorder (MCS) is an ordinary disease of life.
- (4) Whether respondent had adequate notice.
- (5) Whether the Administrative Law Judge erred in awarding a disability percentage for an occupational disease which was not based upon the capacity of the worker to earn wages in any trade or employment as set forth in Schubert v. Peerless Products, Inc., 223 Kan. 288, 573 P.2d 1009 (1978).
- (6) Whether the Administrative Law Judge erred in performing independent medical research which supplemented the record and violated the provisions of K.S.A. 44-501(a) and K.S.A. 44-508(g) which limit the basis of the Administrative Law Judge's award to the "whole record?"
- (7) Whether K.S.A. 44-510e(a) as amended in 1987 mandates that a physician give an impairment rating by its language defining functional impairment "as established by competent medical evidence."
- (8) Whether the Kansas Workers Compensation Act requires that the employer know the cause of claimant's preexisting impairment or handicap to evoke the provisions regarding the Kansas Workers Compensation Fund.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record file herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, born on May 5, 1934, quit school in the middle of his ninth grade year and went to work for the respondent in Arkansas City. Claimant originally worked as a janitor but was then promoted into maintenance. Eventually claimant became a trained mechanic. As a mechanic claimant's job duties involved the tearing down, cleaning and reassembling of aircraft control parts. This activity was performed in an area called the "clean room," a dust-free, pressurized, self-enclosed, self-contained environment. While working in the "clean room" claimant used several chemical solvents on a regular basis. These chemicals included, but were not limited to, trichloroethanes, chloroethanes, trifluoroethanes, methyl chloroform, (also known as trichloroethane 1,1,1), Genesolv D (which is a generic term for freon 113), Tapzol, PD 680, Oakite and trichlorotrifluoroethane. Claimant testified that these chemicals all emitted vapor, and during his exposure in the "clean room" he was required to breathe the vapors from these chemicals and came into contact with these chemicals on his skin on a regular basis. Claimant moved to the "clean room" in approximately 1973 and, at the time of his termination on November 22, 1991, had been working in the "clean room" for approximately 18 years. Claimant terminated his employment with respondent per the advice of his then treating physician.

During several hearings claimant testified to numerous symptoms experienced while working for respondent. Claimant testified that he began having headaches approximately

15 to 18 years prior to the hearings and gave an approximate date of onset of around 1975. Claimant described these headaches as severe, occurring 24 hours a day. Claimant's symptoms also included gastrointestinal complaints, stomach cramps on a regular basis, vomiting, dizziness and staggering as though he were drunk, skin rashes, short-term memory loss, and cardiovascular problems all of which, according to claimant's testimony, began at approximately the time claimant was moved to the "clean room."

Medical records were produced which indicated claimant's symptomatology, in many instances, had long preceded his employment in the "clean room" with respondent. The medical records indicated claimant began having ulcers at age 17. Medical records also identify claimant's ongoing headaches beginning as early as 1952. Claimant was diagnosed and treated for substantial cardiac difficulties as early as 1973 with claimant being hospitalized on more than one occasion due to heart problems in the 1970s. Claimant underwent hiatal hernia surgery in May 1971. Subsequent to the surgery claimant experienced what was described as a dumping phenomenon, where the stomach would dump large amounts of undigested or semi-digested food into the small intestines which, after absorption into the body, caused dizziness, headaches and other symptoms. Claimant has also been diagnosed with hypertension, and has a family history of Alzheimer's disease. Headaches like those experienced by claimant have also been experienced by both his father and his daughter for many years.

Claimant has been examined and/or treated by numerous doctors and psychologists, both before and during the litigation in this matter. The medical records provide a detailed history of claimant's ongoing symptomatology from his teenage years forward, showing more than one instance when claimant has suffered head injuries of a fairly serious nature, one of which rendered him unconscious and caused him to lose memory for three days. Some head injuries predated claimant's employment in the "clean room."

Claimant was questioned on numerous occasions about his tobacco habit. Claimant, at various times, testified to smoking anywhere from one-half pack to two packs of cigarettes per day over a 40 plus year period. When blood tests were run, claimant's carbon monoxide level was found to be 8.6, substantially higher than that found in an average person and somewhat higher than that found in an average smoker.

During claimant's medical evaluations and treatment, he was tested by Marc Alan Quillen, Ph.D., a clinical and neuropsychologist, and Mark D. Goodman, Ph.D., in psychology. Both Dr. Quillen and Dr. Goodman performed clinical and psychological tests on claimant with Dr. Quillen's testing occurring in March 1992 and Dr. Goodman's testing occurring in July 1992.

The testing done by Dr. Quillen indicated claimant's IQ of 88 to be in the low to normal level. Dr. Quillen felt that some of claimant's ongoing symptomatology may be related to possible traumatic head injuries where claimant may have been stunned, dazed or actually lost consciousness. No such injuries were ever reported to the doctor by the claimant, even though claimant did have a history of more than one head trauma episode. Dr. Quillen also suspected possible progressive dementia, noting claimant had a history of Alzheimer's disease in his family.

When Dr. Goodman tested claimant in July 1992, claimant tested borderline retarded with an IQ level of 76. This substantial reduction in claimant's mental abilities from March to July of 1992 both surprised and puzzled Dr. Quillen and Dr. Goodman. Dr.

Quillen felt claimant's reduced abilities could be the result of a traumatic head injury between the tests, a very fast-moving, nonsolvent-related dementia such as Alzheimer's disease, or perhaps could be the result of malingering on the part of claimant. Dr. Goodman testified that claimant had not deliberately attempted to distort any of the test results, basing his opinion upon his clinical experience and training over the many thousands of tests he had performed on various patients. He did note that the 12-point discrepancy between Dr. Quillen's IQ findings and his IQ test results was outside the normal range of deviation in these tests. He agreed that the deviation could not be fully explained by any standard deviation acceptable to the testing community.

Claimant was also examined and/or treated by a multitude of medical doctors regarding his ongoing symptomatology. The medical reports obtained during extensive testing of claimant indicated claimant had been exposed to several chemical solvents over many years. The medical community and toxicology experts were at odds regarding the length of time these solvents would remain in the claimant's system. While Dr. Charles Hinshaw, who testified on behalf of the claimant, felt that certain chemicals could remain in claimant's fat cells for many months after his last exposure possibly causing increased symptomatology, other doctors disagreed with this analysis. Dr. MaryJo A. Wakeman, an occupational medicine specialist, felt these chemicals would have remained in claimant's system for, at the very most, 14 days. She acknowledged that if there was residual damage to the claimant, the damage would persist after the solvent was gone. The many tests run on claimant, which included CT scans, MRIs, blood tests, x-rays and liver exams, revealed little or no chemical involvement in claimant's system. In particular, the liver test performed on claimant proved normal which the medical experts indicated was a key factor in the analysis of claimant's alleged MCS.

Dr. Wakeman objected to the MCS diagnosis as it related to the claimant. She felt claimant's ongoing use of tobacco eliminated any possibility of claimant having MCS. The medical evidence from several sources indicated tobacco smoke contained in the neighborhood of 100 different chemicals, most of which would be objectionable to anyone suffering from MCS. While Dr. Wakeman accepted the existence of MCS as a diagnosis, she very clearly stated claimant did not have the condition.

Evidence contained in the record from various testing sources, including Mr. George M. Rusch, Ph.D., Director of Toxicology for Allied Signal, discussed in detail the acceptable exposure limits of the chemicals in question, based upon both NIOSH and OSHA standards. Dr. W. Morgan Padgett, Ph.D., a consulting and investigatory chemist, also identified a multitude of documents dealing with chemical exposure levels of the various chemicals in question. Dr. Padgett discussed the toxic levels to humans and the possible side effects to be expected from exposure to these chemicals.

A strong dispute arose between the various experts regarding the lack of long-term studies available to pinpoint the length of time or the amount of exposure experienced by claimant involving these various chemicals. All that could be said with certainty was that claimant was involved with these chemicals over approximately a 17 to 18 year period. Testimony from claimant's expert, Dr. Hinshaw, indicated the best way to determine the diagnosis of MCS was to use what has been described as an isolation unit in order to test the amount of chemical emissions coming from claimant's body fat. Unfortunately, these diagnostic tests were never performed on claimant and the only fat tests available in the record found no such chemicals in claimant's body fat.

K.S.A. 1991 Supp. 44-5a01(b) defines occupational disease as follows:

"'Occupational disease' shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. 'Nature of the employment' shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases . . . ."

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award and must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony, along with the testimony of the claimant, and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

It is claimant's responsibility to prove that his occupational disease had its origin in a special risk connected with his particular type of employment. While in certain circumstances it might be shown that exposure to these types of chemicals could cause the symptoms experienced by claimant, the Appeals Board finds, in this case, the claimant has failed in his burden of proving the connection between his ongoing symptomatology and his employment with the respondent. Multiple medical documents in the record show much of claimant's symptomatology to have preexisted his employment with respondent. Multiple medical documents also point to other nonwork-related causes for claimant's ongoing symptomatology including preexisting health problems, surgeries, heart attacks, closed-head traumas, hereditary factors, and claimant's ongoing tobacco habits. It would

be an understatement to say that the medical evidence contained in the record is contradictory.

The Appeals Board finds, after reviewing the record, that claimant has failed to prove by a preponderance of the credible evidence that he had suffered an occupational disease arising out of and in the course of his employment with the respondent. As such, the Award of Administrative Law Judge Shannon S. Krysl dated October 7, 1994, should be, and is hereby, reversed and claimant is denied award against respondent.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the claimant, George Bay, Jr., is denied award against the respondent, General Electric Company and its insurance carrier, Electric Mutual Liability Insurance Company, and the Kansas Workers Compensation Fund for an alleged occupational disease occurring through November 22, 1991.

Claimant's entitlement to additional compensation in the form of unauthorized or future medical benefits is, likewise, denied.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent to be paid as follows:

Ireland and Barber	
Transcript of Preliminary Hearing	\$289.40
Barber & Associates	
Transcript of Regular Hearing	\$372.50
Deposition of Mark D. Goodman, Ph.D.	\$247.30
Transcript of Motion Hearing	\$117.40
Ireland Court Reporting	
Deposition of Kevin Prindable	\$157.44
Deposition of Ronald D. Stansbarger	\$156.10
Deposition of Freda Williams	\$139.00
Deposition of James J. Nethercott	\$ 64.90
Bob Lewis Shorthand Reporting	
Deposition of Charles Hinshaw, M.D.	Unknown
Kelley, York & Associates, Ltd.	
Deposition of Carolyn Sue Eagan	\$261.08
Court Reporting Service	
Deposition of W. Morgan Padgett, Ph.D.	\$299.70
Deposition of Marc Alan Quillen, Ph.D.	\$539.20
Deposition of George Bay, Jr.	\$788.10
Deposition of Maxine Soule	\$276.35
Deposition of Newton C. Smith, M.D.	\$554.50

Deposition of Mark David Goodman, Ph.D.	\$701.65
Deposition of Charles T. Hinshaw, Jr., M.D.	\$522.35
Deposition Services	
Transcript of Motion Hearing	\$ 82.80
Halma-Jilek Reporting, Inc.	
Deposition of Dr. MaryJo A. Wakeman	Unknown
Brody & Geiser	
Depositions of Donald J. Billmaier, M.D. and George M. Rusch, Ph.D.	Unknown

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1996.

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BOARD MEMBER

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c: James Johnston, Wichita, KS  
John David Jurcyk, Lenexa, KS  
J. Philip Davidson, Wichita, KS  
Shannon S. Krysl, Administrative Law Judge  
Philip S. Harness, Director